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INTRODUCTION

The United States Supreme Court wryly but sagaciously remarked thirty years ago that it is "often true that one man's vulgarity is another's lyric."[1] The gender bias of that aphorism aside, the quotation rings true now more than ever. First Amendment[2] battles over where to draw the line between freedom of expression and freedom from offense—be it vulgarity or indecency, racism or homophobia—flared up all over the United States in 2000 and 2001.

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1. Cohen v. California, 403 U.S. 15, 25 (1971).

2. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Fourteenth Amendment's Due Process Clause incorporates the Free Speech and Free Press Clauses, thereby applying them to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

The sites of these battles stretched across traditional and new media, ranging from print newspaper advertisements[3] to broadcast radio programs[4] to online Web sites.[5] They also included non-mediated, person-to-person instances of allegedly offensive expression in the classroom[6] and on the sidewalk.[7]

Beyond the question of medium, the conflicts themselves covered a broad spectrum of subjects, wandering from prickly topics such as slavery reparations[8] and abortion rights[9]

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3. In 2001, David Horowitz created a firestorm on college campuses across the United States when he sought to publish an advertisement in numerous student newspapers that offended many African-Americans. *See* Alan Elsner, *Free Speech Tested in Reparations Debate*, PITTSBURGH POST-GAZETTE, Apr. 15, 2001, at A14. The ad, which argued against reparations for descendants of slaves in the United States, raised anew issues of so-called "political correctness" that allegedly chill offensive expression at many universities. *See id.*

4. In April 2001, the Federal Communications Commission released a lengthy policy statement providing guidance to broadcasters on what material is "indecent" and thus subject to government regulation. *See* Press Release, Federal Communications Commission, FCC Releases Policy Statement Providing Guidance to Broadcasters Regarding Indecency Statute (Apr. 17, 2001), *available at* http://www.fcc.gov/Bureaus/Enforcement/News_Releases/2001/nren0109.html. Indecent broadcast speech can easily be categorized under the more general heading of offensive speech, because its indecent nature may offend the sensibilities of listeners.

5. In March 2001, the Ninth Circuit Court of Appeals concluded that the so-called "Nuremberg Files" Web site, although "pungent, even highly offensive" given its graphic, anti-abortion content, was nonetheless protected speech under the First Amendment. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1017 (9th Cir. 2001).

The Web site SchoolRumors.Com made headlines in March 2001 for providing an online forum for an altogether different brand of offensive speech—tawdry gossip, sexual innuendoes, and insults targeting middle and high school students. Sandy Banks et al., *Web Site Where Students Slung Vicious Gossip is Shut Down*, L.A. TIMES, Mar. 3, 2001, at A1.

6. In February 2001, the Third Circuit Court of Appeals declared unconstitutional, on First Amendment grounds, a public school district's anti-harassment policy that prohibited offensive, denigrating and belittling speech. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

7. In *Gresham v. Peterson*, the Seventh Circuit Court of Appeals upheld Indianapolis' city ordinance limiting street begging and prohibiting "aggressive panhandling" despite First Amendment-based free speech arguments that it was unconstitutional. Gresham v. Peterson, 225 F.3d 899, 901 (7th Cir. 2000).

Recently, a plaintiff's group challenged the constitutionality of Los Angeles' city ordinance regulating panhandling. Los Angeles Alliance for Survival v. City of Los Angeles, 224 F.3d 1076 (9th Cir. 2000). In that case, the Ninth Circuit Court of Appeals affirmed the issuance of a preliminary injunction against enforcement of the ordinance despite accepting the California Supreme Court's conclusion that it was a content-neutral regulation of speech. *Id.* at 1076.

8. *See supra* text accompanying note 3 (describing the advertisement placed by David Horowitz that criticized the concept of paying reparations for slavery).

9. *See supra* text accompanying note 5 (involving the Nuremberg Files Web site).

to sexism[10] and homosexuality.[11] The offensive speech issues even tapped into the raw emotions surrounding unadulterated images of death.[12] Offensive expression in all its forms—music lyrics,[13] photographic images,[14] political cartoons,[15] public art[16]—was everywhere, or so it seemed, as the new millennium began.

This Article surveys more than a half-dozen current cases and controversies that cropped up in 2000 and 2001. Regardless of the medium covering the speech or the underlying topic spurring the strife, each case involved someone or some entity attempting to prevent or regulate speech because its allegedly offensive nature purportedly causes harm. In turn, they all have in common First Amendment issues of line-drawing that attempts to balance interests in a society that is increasingly diverse, not only in color and ethnicity, but in beliefs about what speech should be off limits for

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10. In 2001, Grammy-winning rap artist Eminem drew criticism from National Organization of Women, among other organizations, for his women-bashing lyrics. Neva Chonin, *The Rap on Eminem*, S.F. CHRON., Feb. 20, 2001, at A1 (writing that Eminem, on the *Marshall Mathers LP*, "delivers another I'm-gonna-kill-you song about his longtime girlfriend-turned-wife, Kim. He also goes to town on women in general on the track 'Kill You'").

11. *See* George Varga, *Reactions; Embrace or Embargo Eminem?*, SAN DIEGO UNION-TRIB., Feb. 18, 2001, at F1. Eminem's lyrics have been described as "homophobic" and have drawn criticism and protest from the Gay & Lesbian Alliance Against Defamation. *Id.*

12. *See* Terry Blount, *Two Sides to Earnhardt Autopsy Furor*, HOUSTON CHRON., Mar. 10, 2001, at 11. In 2001, the potential public release of autopsy photographs of the late NASCAR driver Dale Earnhardt prompted a public outcry. *Id.* Earnhardt's wife Teresa claimed publication of the photographs would have been offensive to her. *Id.* As discussed later, the Earnhardt controversy raises broad and far-reaching questions about the tension between privacy, offensiveness and newsworthiness. *See* discussion *infra* Part II.D.

13. *See supra* notes 10-11 and accompanying text (regarding Eminem's lyrics).

14. *See supra* note 12 and accompanying text (regarding the autopsy photographs of Dale Earnhardt).

15. In April 2001, while the Chinese government detained crew members of a Navy spy plane, cartoonist Pat Oliphant "did a piece that portrayed a buck-toothed waiter dumping eat innards on Uncle Sam and demanding, 'Apologize Lotten [sic] Amellican [sic]!'" Richard Roeper, *China Standoff Reveals Racism's Tenacious Grip*, CHI. SUN-TIMES, Apr. 18, 2001, at 11.

16. New York City Mayor Rudolph Giuliani formed an art decency panel in April 2001 to recommend decency standards for exhibitions in museums receiving city funds. John J. Goldman, *No Longer in Eye of Beholder, N.Y. Art in Eye of Storm*, L.A. TIMES, Apr. 7, 2001, at A12. The topic of offensive speech was at the heart of this panel. As First Amendment defense attorney Floyd Abrams remarked, "'[w]hat the mayor has asked this decency commission to look into is essentially whether there is some way that the city can defund or stop funding museums that offer art that the mayor or the commission find offensive. . . . And that is precisely what the First Amendment forbids.'" *Id.*

public consumption and what speech should be privileged in an open marketplace of ideas.[17]

Part I of this Article sets forth basic principles regarding offensive speech articulated by the United States Supreme Court.[18] Part II examines and critiques the current state of offensive speech controversies that test the principles described in Part I.[19] Additionally, Part II addresses some of the remedies that parties have used to challenge offensive speech in these cases, from prime examples of the counter speech doctrine[20] to outright vandalism intended to silence the offending speech.[21] Along the way, Part II illustrates how these battles often involve the same topics and subjects that have long made Americans queasy about the scope of First Amendment protection. Finally, Part III attempts to synthesize the battles described in Part II and suggests that the same standards the United States Supreme Court applied in the past on these issues must remain in place today rather than bend to conform with what seems to be a thinning of the American skin.[22]

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17. "The 'marketplace of ideas' is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). The metaphor is used frequently today, more than eighty years after it first became a part of First Amendment jurisprudence, with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a fairly recent review of the Court's use of the marketplace metaphor).

18. *See infra* notes 23-52 and accompanying text.

19. *See infra* notes 53-245 and accompanying text.

20. *See generally* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553 (2000) (discussing the counter speech doctrine as applied to a laundry list of then-recent cases).

21. At Brown University, "protestors stole 4,000 copies of the newspaper" that published the advertisement by David Horowitz that used "provocative and pugnacious language" to denounce the idea of paying reparations to the descendants of American slaves. John Leo, *Ivy League Therapy*, U.S. NEWS & WORLD REP., Apr. 2, 2001, at 14.

22. *See infra* notes 246-72 and accompanying text.

I. AS OFFENSIVE AS WE WANNA BE?:[23] THE SUPREME COURT'S RULINGS

Notwithstanding its otherwise absolutist language, the First Amendment to the United States Constitution does *not* protect all forms of expression.[24] For instance, obscene speech falls outside the ambit of First Amendment protection,[25] as does child pornography[26] and expression directed toward inciting or provoking imminent violent and unlawful conduct.[27] In addition, the First Amendment does not protect so-called "fighting words."[28] Fighting words, as defined by the United States Supreme Court in 1942, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[29] That Court has narrowed the

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23. Florida officials prosecuted the rap group 2 Live Crew, well known for its offensive lyrics, in the early 1990s for obscenity based on its top-selling album, *As Nasty As They Wanna Be*. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582-83 (S.D. Fla. 1990). A federal district court judge in that case concluded the recording was obscene. *Id.* at 603. The Eleventh Circuit Court of Appeals, however, reversed on grounds that the judge, simply by listening to the work and in the face of contrary expert testimony, could not properly conclude that it lacked serious artistic value. Luke Records, Inc. v. Navarro, 960 F.2d 134, 139 (11th Cir. 1992). Thus, although the album may have been offensive, it was not obscene and therefore merited First Amendment protection. *Id.*

24. Despite the literal language of the First Amendment that suggests Congress can never make any law abridging freedom of speech, "[t]he fact is that First Amendment law is far more complex than the Constitution's command." JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 169 (2d ed. 1996). "Although the First Amendment is written in absolute language that Congress shall make 'no law,' the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 750 (1997).

25. *See* Miller v. California, 413 U.S. 15, 23 (1973) (observing that it "has been categorically settled by the Court, that obscene material is unprotected by the First Amendment").

26. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography"); New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of the First Amendment").

27. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government cannot forbid even the advocacy of force or illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 13-55 (1999) (providing a summary, including case excerpts, of the development of the incitement jurisprudence under the First Amendment).

28. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71 (1942).

29. *Id.* at 572.

doctrine, however, to apply only to direct, face-to-face personal insults.[30]

Conspicuously absent from this brief list of categories of expression falling outside the ambit of First Amendment protection is offensive speech. The general rule is that speech may not be censored solely because some find it offensive. As the late Justice William J. Brennan wrote in holding that flag burning is a form of offensive speech protected by the Constitution, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself *offensive* or disagreeable."[31]

Thus, the Supreme Court has protected the ability of an individual to wear the offensive message "Fuck the Draft" on the back of his jacket in a Los Angeles courthouse.[32] In *Cohen v. California*, the Court wrote "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[33]

Following in the footsteps of *Cohen*'s protection, a federal appellate court recently held that the First Amendment protects racist speech—speech offensive to minorities and, for that matter, to many Caucasians—conveyed anonymously via the telephone to a public official.[34] In *United States v. Popa*, the defendant called Eric Holder, then the United States Attorney for the District of Columbia, "a

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30. *See* Gooding v. Wilson, 405 U.S. 518, 524 (1972) (holding that the fighting words standard is limited to speech only if it has "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"); Cohen v. California, 403 U.S. 15, 20 (1971) (upholding an individual's use of a four-letter word on his jacket because there was no evidence the word could be taken "as a direct personal insult"). Supreme Court decisions have "made clear that the 'fighting words' exception to the first amendment protection must be narrowly construed." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 850 (2d ed. 1988).

31. Texas v. Johnson, 491 U.S. 397, 414 (1989) (emphasis added).

32. *Cohen*, 403 U.S. at 20, 25.

33. *Id.* at 25.

34. United States v. Popa, 187 F.3d 672, 678 (D.C. Cir. 1999). *See generally* Clay Calvert, *Protecting the Cellular Citizen-Critic: The State of Political Speech from* Sullivan *to* Popa, 9 WM. & MARY BILL RTS. J. 353, 355-56 (2001) (analyzing the *Popa* decision and its ramifications for the protection of political speech under the First Amendment).

criminal, a negro" and "a whore, born by a negro whore."[35] The Court of Appeals for the District of Columbia held the First Amendment protected such offensive bile from prosecution under a federal law restricting telephonic harassment.[36]

In 1988, the United States Supreme Court issued its opinion in *Hustler Magazine, Inc. v. Falwell*,[37] which protected the magazine's right to ridicule, in a highly offensive manner, public figure Jerry Falwell.[38] The Court, without dissent,[39] turned back Reverend Falwell's claim for intentional infliction of emotional distress resulting from an ad parody published in *Hustler* in its November 1983 issue.[40] The parody suggested that Falwell, the founder of the Moral Majority and a nationally known minister, had engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[41] The Court, reversing the decision of the United States Court of Appeals for the Fourth Circuit, held that public figures such as Falwell could not recover for intentional infliction of emotional distress based on publications such as the *Hustler* ad parody without also proving actual malice,[42] a standard applicable to public figures

35. *Popa*, 187 F.3d at 673.

36. *Id.* at 678-79.

37. 485 U.S. 46 (1988).

38. *Id.* at 50.

39. Seven Justices joined in the Court's opinion. *Id.* at 47. Justice Byron White wrote a brief concurrence, while Justice Anthony Kennedy, who had just joined the Court, did not take part in the decision. *Id.*

40. *See generally* Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 471 (2000) (describing the tort of intentional infliction of emotional distress and analyzing its viability as a theory of legal relief against the media).

41. *Hustler*, 485 U.S. at 48.

42. Actual malice, a fault standard adopted by the U.S. Supreme Court in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), is the publication of a statement with knowledge of its falsity or with a reckless disregard for whether the statement is true or false. *Id.* at 279-80. Reckless disregard for the truth, in turn, exists when a defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Reckless disregard for the truth can also exist when a defendant acts with a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). The Supreme Court has observed that although a mere failure to investigate information, standing alone, will not support a finding of actual malice, "the purposeful avoidance of the truth is in a different category." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989).

and public officials in defamation law.[43] In reaching this conclusion, the Court quoted an earlier opinion, *FCC v. Pacifica Foundation*,[44] for the proposition that the "fact that society may find speech offensive is *not* a sufficient reason for suppressing it."[45]

Anthony Lewis, the long-time columnist and Supreme Court reporter for *The New York Times* and Lecturer on Law at Harvard Law School from 1974 to 1989, described the case this way:

> The decision in *Hustler v. Falwell* was important for freedom of speech generally. It showed that the Supreme Court, including judges considered conservative, had an expansive sense of the kind of speech about public matters that the Constitution requires American society tolerate – not just George Washington as an ass but Jerry Falwell with his mother in an outhouse.[46]

It should be clear from the above review that the First Amendment protects offensive speech, particularly when the target is either a public issue or a public figure and when the setting is not one involving a captive audience of children.[47] And while the Federal Communications Commission may regulate what might be considered a sub-category of offensive speech—indecent

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43. *See Hustler*, 485 U.S. at 56. Defamation includes both the libel and slander torts. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements of a cause of action for defamation include: "(a) a false and defamatory statement concerning another; (b) [the] unprivileged publication [of that statement] to a third party; (c) fault . . . ; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the [statement]." RESTATEMENT (SECOND) OF TORTS § 558 (1977).

44. 438 U.S. 726 (1978).

45. *Hustler*, 485 U.S. at 55 (emphasis added) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

46. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 233 (1991).

47. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (upholding a public high school's power to punish a student for a sexual innuendo-laden speech to an assembly of approximately six hundred students, including many fourteen-year-olds).

expression—in the broadcast medium,[48] even indecent speech in broadcasting is not without First Amendment protection as this Article discusses later.[49] The bottom line then, is the First Amendment safeguards offensive speech but not obscenity, child pornography, incitement to violence, and fighting words.

Rationales for this position are many: (1) line drawing between offensive and non-offensive speech is too difficult and too subjective to provide rational distinctions, and therefore we must put up with offensive speech;[50] (2) we strive to be viewed as, and to identify ourselves as, a tolerant society, which means, ironically, that we must tolerate what sometimes amounts to extremely offensive and intolerant expression;[51] (3) the injury of being offended is a temporary and intangible mental state that is not as serious or the same as physical harms or tangible injuries caused by something like a thrown punch;[52] and (4) it is not for the government to dictate rules of civility and social mores of speech interactions through laws that tell citizens what they can and cannot say.

With this background in mind, Part II of this Article analyzes numerous recent incidents involving a variety of forms of offensive speech. These incidents may test our current beliefs and jurisprudence

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48. *See* 18 U.S.C. § 1464 (2001) (providing that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined [under this title] or imprisoned not more than two years, or both").

49. *See* discussion *infra* Part II.C.

50. This problem relates directly to the void for vagueness doctrine and the difficulty in defining terms like offensive and insulting. For instance, in February 2001, the Supreme Court of Arkansas declared unconstitutional a statute that made it "a misdemeanor for any person to abuse or insult a public school teacher who is performing normal and regular or assigned school responsibilities." Shoemaker v. State, 38 S.W.3d 350, 351 (Ark. 2001). The court observed that "[w]hat language is insulting or abusive is not defined so as to put a reasonable person on notice of the proscribed conduct." *Id.* at 356.

51. *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY 9 (1986) (remarking that "[d]espite the inability of conventional theories of free speech to account for this phenomenon of overprotection, there does seem to be a shared intuition that the society adds something important to its identity, that it is significantly strengthened, by these acts of extraordinary tolerance").

52. SMOLLA, *supra* note 17, at 48. Law Professor Rodney Smolla makes this distinction between physical harms and what he calls "reactive harms" including "injuries to community values concerning morality and civility." *Id.*

regarding the protection of offensive expression, as well as what we consider to be the appropriate ways to respond to such speech. Once again, they raise concerns about privacy, political correctness, and government censorship that threaten to stymie the unenumerated First Amendment right to offend.

II. SURVEYING THE OFFENSIVE SPEECH LANDSCAPE: A WILD RIDE THROUGH NON-GENTEEL TERRAIN

This Part surveys the current crop of cases and controversies that are unified by one overarching theme: they all pivot on speech that offends. The survey is organized by either the medium transmitting the speech in question or, in instances of face-to-face communication, the setting where the speech occurred.

A. The World Wide Web: A New Forum for Offensive Speech

The World Wide Web,[53] ("Web") dubbed by the United States Supreme Court only a few years ago in 1997 as a "new marketplace of ideas"[54] is, in fact, today a virtual and vibrant marketplace of offensive speech.[55] This Part highlights two current examples of this phenomenon.

First, it examines the Ninth Circuit Court of Appeals' March 2001 decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*,[56] which protected a Web site undoubtedly offensive to pro-choice abortion proponents. As will become clear, this opinion also illustrates the fundamental difference

53. The Web "is a global hypertext system that runs on the Internet" and allows one to navigate "by clicking on hyperlinks (embedded links) that connect to other documents or graphic, audio or video resources." Joseph Kershenbaum, *E-Commerce Primer: A Concise Guide to the New Public Network*, 1 E-COMMERCE L. REP. 14 (Sept. 1999).

54. Reno v. ACLU, 521 U.S. 844, 885 (1997).

55. *See* Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL'Y 287 (2001) (observing that "[t]he World Wide Web has allowed marginalized extremist groups with messages of hate to have a more visible and accessible public platform. Hate-based Web sites have grown dramatically in recent years").

56. 244 F.3d 1007 (9th Cir. 2001).

between speech that is offensive and speech that constitutes a true threat of violence. The former is protected expression, while the latter is not.[57] After discussing *Planned Parenthood*, this Part then examines the increasing popularity of the Web as a medium and vehicle for minors to convey often offensive and vulgar remarks about their teachers and classmates to a potentially large audience.[58] The contention here is that the remedies for such offensive speech are found in the civil law of defamation and in criminal sanctions imposed on true threats. However, this Part also illustrates that many of the offensive comments posted by students on the Web are merely that—offensive statements comprised of loose rhetoric and over-the-top hyperbole that cannot be punished under either defamation law or threats statutes.

1. The Nuremberg Files Web Site

Whether a jury in Portland, Oregon was overwhelmed by emotion, stirred by fear, confused by technology, or some combination thereof, its decision—a multi-million dollar verdict designed not just to curb offensive expression on the Internet but to pound it deep into the ground[59]—has kept alive the debate over just how much protection cyberspeech deserves.[60] In *Planned Parenthood*, the lawsuit pitted abortion providers against anti-abortion activists.[61] The opponents' discourse had ratcheted up to the point where jurors were left to sort out whether a makeshift "hit list" of abortion-friendly doctors was just a clever way to hammer home a point or, more menacingly, a

57. *See* discussion *infra* Part II.A.1.

58. *See* discussion *infra* Part II.A.2.

59. *See* Rene Sanchez, *Doctors Win Suit Over Antiabortion Web Site*, WASH. POST, Feb. 3, 1999, at A1 (discussing the jury's decision against the Nuremberg Files Web site).

60. *See generally* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998). The United States Supreme Court has held that speech conveyed on the Internet is not subject to the type of qualified or reduced amount of First Amendment protection that applies to the broadcast medium. Reno v. ACLU, 521 U.S. 844, 868-70 (1997).

61. *Planned Parenthood*, 23 F. Supp. 2d at 1184.

"true threat" to the health professionals' safety.[62] The jury found the latter.[63]

Amidst the photographs of mangled fetuses and other offensive images, visitors to a Web site called the "Nuremberg Files"[64] could find the names, home addresses, and photographs of physicians who performed abortions and, in some cases, information identifying their family members and other supporters.[65] The Web site contained names of hundreds of abortion proponents color-coded to indicate whether the individual had been wounded.[66] A line slashed through the name of three providers indicated they had been murdered.[67]

The pro-choice activists who filed the lawsuit against the Web page creators[68] believed the Web site contained an implied threat to the safety and well being of abortion providers.[69] Federal District

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62. *See* Watts v. United States, 394 U.S. 705, 707-08 (1969) (describing how "true threats" are not entitled to constitutional protection); *see also* United States v. Baker, 890 F. Supp. 1375, 1385 (E.D. Mich. 1995), *aff'd sub nom.* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (setting forth a test for determining a "true threat").

63. *See* Sanchez, *supra* note 59, at A1.

64. The site received the name "Nuremberg Files" because anti-abortion activists analogized the work of doctors performing abortions to Nazi war criminals. *See* Patrick McMahon, *Anti-Abortion Site Kicked Off Web*, USA TODAY, Feb. 8, 1999, at 2A.

65. *See* Adam Cohen, *Cyberspeech on Trial*, TIME, Feb. 15, 1999, at 52.

66. *See* Lawrence Viele, *Of Free Speech, Abortions and Dead Doctors*, RECORDER (San Francisco), Feb. 11, 1999, at 1.

67. *See* George M. Kraw, *Net Loss*, RECORDER (San Francisco), Feb. 10, 1999, at 5 (examining how some people view the Internet as faciliting terrorist activities).

68. The plaintiffs included Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, and five individual physicians who performed abortions as part of their medical practices. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1184-85 (D. Or. 1998). The plaintiffs contended that the Nuremberg Files Web page, along with several printed posters and a bumper sticker urging readers to execute abortionists, constituted true threats and violated the Freedom of Access to Clinic Entrances Act of 1994. *Id.* at 1186-88. The defendants—fourteen individual anti-abortion activists, along with the American Coalition for Life Activists and the Advocates for Life Ministries—won a motion for summary judgment regarding the bumper sticker and several posters but the court allowed the dispute over whether the Nuremberg Files Web page violated the Freedom of Access to Clinic Entrances Act to proceed to trial. *Id.* at 1195.

69. *See* Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. TIMES, Feb. 3, 1999, at A9 (describing a statement by Planned Parenthood Federation of America President Gloria Feldt, who declared: "Whether these threats are posted on trees or on the Internet, their intent and impact is the same: to threaten the lives of doctors who courageously serve women seeking to exercise their right to choose abortion.").

Court Judge Robert Jones allowed jurors to consider the recent violence at abortion clinics in determining whether the Web page constituted a threat.[70] The jury decided that a threat existed and returned a staggering $107 million judgment against the site's creators.[71]

The issue on appeal was simply stated: Does the First Amendment protect speech that results in such a far-reaching amount of actual and punitive damages?[72] The finer point was whether the speech constituted an actionable *threat.* As the Ninth Circuit Court of Appeals observed: "If [the] defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment."[73] Short of being a threat, the virtual "hit list" could be viewed only as offensive to the individuals named and others who might view the online dossiers.[74]

The court suggested that other political movements throughout this nation's history have included "extreme rhetoric,"[75] but the related speech has to be marked by something more than outrageous remarks to have it fall outside the boundaries of First Amendment protection.[76] In one of its earliest pronouncements on this topic, the United States Supreme Court found that any such speech must present a clear and present danger that some untoward consequence would likely occur.[77] The Court modernized the standard some fifty

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70. *See* Carl Rowan, *A Deadly Abuse of the First Amendment*, BUFFALO NEWS, Feb. 9, 1999, at B3.

71. *Id.*

72. Planned Parenthood of the Columbia/Willamette v. Am. Coalition of Life Activists, 244 F.3d 1007, 1012 (9th Cir. 2001).

73. *Id.* at 1014-15.

74. *Id.*

75. *Id.* at 1014.

76. *Id.*

77. Schenck v. United States, 249 U.S. 47, 52 (1919). Justice Oliver Wendell Holmes, Jr., wrote:
> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

years later, concluding that even the advocacy of force and violence is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[78]

The Ninth Circuit Court of Appeals suggested that even invitations to commit violence were not a sufficient basis for restricting speech unless the speaker had "authorized, ratified, or directly threatened [acts of] violence."[79] Absent direct incitement, the advocacy appears to do little more than call for action at some distant time, and as the court observed: "It doesn't matter if the speech makes future violence more likely; advocating 'illegal action at some indefinite future time' is protected."[80]

Moreover, the anti-abortion Web site specifically did not call for any violent action.[81] The court of appeals noted that the statements at issue, "while pungent, even highly offensive," carefully avoided threatening the doctors—calling only for the gathering of information about abortion proponents.[82]

A significant point for the court was the context in which the speech was made.[83] Context traditionally has played a role in determining the volatility of speech and the scope of protection attached to it.[84] The question to consider here was whether the context—a hot-button political and social movement—could be used "to import a violent meaning" to otherwise non-violent statements.[85]

Id.

78. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

79. *Planned Parenthood*, 244 F.3d at 1014. Here the court of appeals noted the U.S. Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982), where the proprietors of white-owned businesses sued the civil rights organization and others who had boycotted their stores. One of the organizers, Charles Evers, threatened to discipline anyone who did not abide by the boycott. *Id.* at 1019.

80. *Id.* at 1015 (quoting Hess v. Indiana, 414 U.S. 105, 108 (1973)).

81. *Id.* at 1017.

82. *Id.*

83. *Id.* at 1018-19.

84. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (regarding the context of the issue and the setting of the speech).

85. *Planned Parenthood*, 244 F.3d at 1018.

The court emphasized the fact that "all the statements were made in the context of public discourse, not in direct personal communications."[86] Obviously, the appellate court recognized an important distinction between hyperbolic remarks made in a speech and those more akin to fighting words made face-to-face to a threatened target.[87]

Finally, the court of appeals relied upon the political nature of the abortion issue, observing "speech made through normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment."[88] The Internet clearly has come into its own as a channel of communication, and the controversial nature of the policy issues surrounding the abortion debate is apparent. Consequently, as the court of appeals observed: "If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued."[89]

2. SchoolRumors.Com and Student Vitriolic Speech

Offensive speech on the Web is not solely the province of anti-abortion advocates or adults. In fact, children in the United States are the one segment of society fully exploiting the offensive-speech capacities of this relatively new medium. In particular, middle school and high school students across the country are creating their own Web pages—their own high-tech soapboxes—from which they frequently lambaste, in offensive tones, their principals, teachers, and fellow students.[90]

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86. *Id.*
87. *Id.* at 1019.
88. *Id.*
89. *Id.*
90. *See* Emily Wax, *Censored Students Post Their Exposes Online; Sites Pose Dilemma for School Officials*, WASH. POST, Sept. 19, 2000, at B1; *see also* Bill Cole, *Students Using Internet as Legal Shield for Cheap Shots*, CHI. DAILY HERALD, June 19, 2000, at 1 (describing the growing use of the Web by students as a place to attack other students and teachers).

For instance, in September 2000, an eighth-grade student was suspended from school in New Mexico after he created a so-called "Graffiti Wall" Web site "where students could post the names of other students they hated."[91] Elsewhere, in July 2000, a Pennsylvania appellate court upheld the permanent expulsion of a middle school student, Justin Swidler, who created a Web site called "Teacher Sux" on which he called a teacher a "bitch," as well as a "fat fuck" who shows off her "fat fucking legs."[92] The site also had a diagram of the teacher "with her head cut off and blood dripping from her neck."[93]

And, contrary to traditional stereotypes, girls are not afraid to dish up a heaping helping of online offensive speech. In particular, in March 2000, the Gates Intermediate School in Massachusetts[94] suspended three eighth-grade girls for creating a Web site on a home computer that contained obscenity-laced insults directed at fifteen classmates, almost all of whom were girls.[95] One student at the school called the site "awful" and asserted "[i]t was one of the worst things I had ever seen. . . . There was this awful language about some of my friends."[96] For instance, the site, which reportedly drew more than four hundred visitors, called some students "anorexic" and criticized them for having "frizzy hair and irregular boobs."[97]

The proliferation of offensive student speech on the Web stretches beyond the reach of individual, student-created Web pages. In March 2001, service provider Invite Internet shut down a Web site called SchoolRumors.Com.[98] According to the *Los Angeles Times*, the site

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91. *School Agrees to Erase Punishment of Students Suspended for Web Site 'Graffiti Wall'*, Student Press Law Ctr. Web Site, *at* http://www.splc.org/newsflashes/2001/030601newmexico.html (last visited Apr. 3, 2001).

92. J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 416 (Pa. Commw. Ct. 2000).

93. *Id.*

94. More information about the Gates Intermediate School can be found on its own Web site at http://www.ssec.org/idis/gate/start.htm (last visited Nov. 13, 2000).

95. Tom Benson, *School Suspends 3 for Web Site*, PATRIOT LEDGER (Quincy, Mass.), Mar. 2, 2000, at 1.

96. Sandy Coleman, *Battling the Web's Dark Side, Schools Balance Student Rights, Rules in Incidents on Net*, BOSTON GLOBE, Mar. 27, 2000, at B1.

97. *Id.*

98. Banks et al., *supra* note 5, at A1.

"spread explicit and malicious rumors across Southern California campuses" and received blame for causing "an unwelcome explosion of electronic gossip and adolescent angst."[99] The site and its imitators, as the newspaper pointed out, underscore "the difficulty of controlling offensive speech on the Internet."[100]

A visit in May 2001 to the controversial Web site by one of the authors of this article found it still closed.[101] The site, however, contained a message, the opening of which read:

> Welcome to SchoolRumors.COM, the Internet site, which believes in granting people the right to free speech. School Rumors.COM was shut down for a while due to the server before which believed that people should not have a right to free speech, especially the youth. School Rumors.COM is planning to launch a rumors site in about 4 weeks or maybe even sooner.[102]

The message is revealing because it clearly frames its struggle for existence as one founded upon the First Amendment concerns of "the right to free speech."[103] It also features a transparent appeal to minors, with its mention that some people feel that "the youth" should not possess free speech rights.[104] What checks exist on the offensive speech of students conveyed on the World Wide Web? Three readily come to mind: (1) civil defamation laws;[105] (2) criminal threats

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99. *Id.*
100. *Id.*
101. SchoolRumors.Com, *at* http://www.schoolrumors.com (last visited May 4, 2001).
102. *Id.*
103. *Id.*
104. *Id.*
105. Defamation includes both libel and slander torts. KEETON ET AL., *supra* note 43, at 771. The basic elements of a cause of action for defamation include: "(a) a false and defamatory statement concerning another; (b) [the] unprivileged publication [of that statement to at least one] third party; (c) fault . . .; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the statement. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

statutes;[106] and (3) in-school suspensions. The United States Supreme Court's ruling that the First Amendment protects statements that constitute "imaginative expression" and "rhetorical hyperbole" severely limits the first remedy—civil defamation actions.[107] Thus, the more outrageous and unbelievable the offensive statement in question, the more likely it is to be protected. On the other hand, some traditional forms of juvenile name calling—labeling a girl a slut, for example—may be actionable in defamation law because they imply underlying factual conduct.[108] Defamation law thus provides some, albeit not complete, relief for individuals attacked by offensive Web postings.

The second avenue of redress is criminal investigation and prosecution under the theory that the offensive speech is more than simply offensive and, in fact, constitutes a true threat of violence. For instance, in the case mentioned above involving Justin Swidler's Web site "Teacher Sux," both the local police and the Federal Bureau of Investigation conducted investigations to determine if Swidler's site constituted a true threat of violence.[109] The two agencies, however, declined to pursue criminal charges.[110] As noted earlier regarding the Nuremberg Files Web page, there is a substantial difference between speech that merely offends and speech that actually threatens.[111]

The final form of potential redress for offensive speech posted by minors in cyberspace involves neither the civil nor criminal justice systems. Instead, it rests in the capacity of schools to mete out their own form of justice. In 2000 and 2001 alone, a wave of cases throughout the United States involving on-campus punishment for

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106. *See generally* Ashley Packard, *Threats or Theater: Does* Planned Parenthood v. American Coalition of Life Activists *Signify That Tests for "True Threats" Need to Change?*, 5 COMM. L. & POL'Y 235 (2000) (reviewing several threats statutes).

107. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

108. *See* Bryson v. News Am. Publ'ns, Inc., 672 N.E.2d 1207, 1215 (Ill. 1996) (concluding, in the context of a libel lawsuit, that the word "slut" implies an accusation of fornication and thus falls within a category of statements that are actionable per se).

109. J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 415 (Pa. Commw. Ct. 2000).

110. *Id.* at 415 n.2.

111. *See supra* Part II.A.1.

off-campus Web-based expression began to swell.[112] These cases raise serious questions about the scope of authority schools should have over student speech when students engage in that speech off campus.

In sum, the Web today is home not only to vast amounts of pornography—a form of speech itself offensive to many—but to direct offensive attacks on individuals. While the true threats doctrine and defamation law provide some limitations on such speech, they are not absolute. The next Part of this Article turns to a more traditional medium—the print newspaper—to examine recent instances of offensive expression.

B. Newspapers: Racism in Advertisements and Cartoons

One of the oldest forms of mass media in the United States is the printed newspaper. Although many daily newspapers have experienced a decrease in readership over the past two to three decades,[113] they still are capable of riling the public, especially when they print speech that some deem offensive. In the two 2001 controversies described in this Part, one involves an advertisement submitted to college newspapers while the other involves a political cartoon published in mainstream newspapers.

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112. For instance, in February 2001, Washington teenager Karl Beidler accepted a $62,000 settlement (including attorney fees) from his high school, which kicked him out for creating a Web page mocking an assistant principal. Lisa Stiffler, *Ex-Student Awarded Damages in His Free-Speech Lawsuit*, SEATTLE POST-INTELLIGENCER, Feb. 21, 2001, at B1. *See generally* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (enjoining a public school from enforcing a suspension of student Nick Emmett, who created a Web page that school administrators found threatening and offensive).

113. RICHARD CAMPBELL ET AL., MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION 259 (2d ed. 2000) (observing that "the percentage of adults who read the paper at least once a week dropped from 78 percent in 1970 to around 59 percent by 1997" and adding that "[w]hile some newspapers experienced circulation gains in the 1980s and early 1990s, especially in more affluent suburban communities, readership in the United States generally declined or flattened out during this period").

1. Slavery Reparations and the David Horowitz Ad

Perhaps the highest profile controversy of 2001 concerning offensive speech involved a newspaper advertisement entitled *Ten Reasons Why Reparations for Slavery is a Bad Idea—And Racist Too.*[114] David Horowitz[115] drafted and submitted the full-page advertisement to over fifty college newspapers.[116] It "landed like a series of grenades on campuses from coast to coast, setting off angry demonstrations and bitter, sometimes agonized discussions about the limits of free speech at American universities."[117] The advertisement employed what one journalist described as "provocative and pugnacious language" in arguing against making payments to the descendants of black American slaves.[118]

Many deemed the speech offensive—so offensive in fact that the overwhelming majority of college newspapers receiving the advertisement chose not to print it.[119] The First Amendment protects editors in their decisions regarding what content to publish.[120] Despite this fact, the editors who exercised self-censorship may be viewed as representative of the alleged chilling effect the so-called political correctness movement casts upon conservative-leaning speech at public universities.[121] What's more, the advertisement raised a vital question: What is the proper response for dealing with speech that we may find offensive?

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114. *See* Jonathan Alter, *Where PC Meets Free Speech*, NEWSWEEK, Apr. 2, 2001, at 31 (discussing the advertisement and the controversies that it raised).

115. *See* Michael Powell, *A Radical Transformation*, WASH. POST, Mar. 28, 2001, at C1 (providing background on Horowitz and his transformation from a leftist in the 1960s to a conservative today).

116. Rebecca Trounson, *Agitation by Ad*, L.A. TIMES, Apr. 10, 2001, at B1.

117. *Id.*

118. Leo, *supra* note 21, at 14.

119. *See* Patrick Healy, *Author Defends Ad on Slavery*, BOSTON GLOBE, Apr. 3, 2001, at B3 (observing that fourteen campus newspapers ran the ad while thirty-five rejected it).

120. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment.").

121. *See generally* ROBERT D. RICHARDS, FREEDOM'S VOICE 27-42 (1998) (discussing the speech climate on the campuses of universities in the United States).

Several answers appeared to emerge as a result of the Horowitz advertisement. One response was to stifle the offensive speech altogether, removing it from the metaphorical marketplace of ideas. This transpired at those newspapers that chose never to publish the advertisement, thus jettisoning it from the speech market. It also took a more disturbing form. For example, at Brown University "groups of students seized the press run" after the student newspaper ran the advertisement.[122] The coalition of ethnic and political student groups at Brown that swiped nearly four thousand copies of the *Brown Daily Herald* called it "an act of civil disobedience."[123]

Such a reaction—to essentially steal and delete speech that we may find offensive—not only contradicts the marketplace of ideas' notion that all ideas should be disseminated and contested in a free and fair fight, but it also opposes the counter speech doctrine. The late United States Supreme Court Justice Louis Brandeis wrote nearly seventy-five years ago that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[124] In other words, if Horowitz's speech—his advertisement—is filled with what Brandeis would call "falsehood and fallacies," then the proper response to it is to add more speech with an opposing viewpoint to the marketplace of ideas. Indeed, universities are uniquely those places devoted to Brandeis' "processes of education";[125] if not counter speech in this venue, then where?

What makes the reaction at Brown and universities whose newspapers refused to print the offensive speech particularly disturbing is that the speech at issue involves slavery reparations, a matter of political concern that is ripe for public debate. Constitutional law scholar Erwin Chemerinsky observes "[t]here is

122. *Unfree Speech*, PITTSBURGH POST-GAZETTE, Mar. 23, 2001, at A22.

123. Mary Beth Marklein, *Anti-Slavery-Reparations Ad Adds Fuel to Free-Speech Fire*, USA TODAY, Mar. 22, 2001, at 7D.

124. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

125. *Id.*

little disagreement that political speech is at the core of that protected by the First Amendment."[126] And while the editors who chose not to run the Horowitz ad certainly exercised their own First Amendment editorial control rights, they also acted paternalistically in deciding what speech is too offensive for their adult audience to handle, accept, or reject.

On top of this, universities ideally embody open marketplaces of ideas. The United States Supreme Court, in its 1972 decision of *Healy v. James*,[127] wrote "[t]he college classroom *with its surrounding environs* is peculiarly the 'marketplace of ideas.'"[128] The newspapers that chose not to run the Horowitz advertisement, as well as those students at Brown University who stole the newspapers, apparently do not agree with the Court's position.

Counter speech, however, was evident at some universities in the form of demonstrations against the newspapers that ran the advertisement. At the University of Wisconsin, for instance, "more than 100 shouting demonstrators marched on the off-campus offices" of the *Badger Herald* to demand that the editor-in-chief, who chose to run the advertisement, resign.[129] Students at Duke University also demonstrated.[130] These students were within their rights to voice their opposition to Horowitz's advertisement by adding more speech to the marketplace of ideas.

Another interesting form of counter speech occurred in this latest on-campus ruckus over offensive speech. In particular, some newspapers that ran the advertisement later apologized in newsprint or explained their decision to publish.[131] This type of speech not only

126. CHEMERINSKY, *supra* note 24, at 752.
127. 408 U.S. 169 (1972).
128. *Id.* at 180 (emphasis added).
129. Trounson, *supra* note 116, at B1.
130. Alter, *supra* note 114, at 31.
131. *See* Icess Fernanadez, *Ad in College Newspaper, 'Apology' Stir Industry Reactions*, ASNE REP., Apr. 4, 2001, at 13 (discussing the decision of the student newspaper at Arizona State University to run what the director of student media there, Bruce Itule, called an "explanation" for printing the ad).

adds context but, in some cases, a counter viewpoint in the marketplace of ideas.

Perhaps the most ideal form of counter speech in the Horowitz situation would have been for the proponents of slavery reparations to run their own advertisements. The problem with this "ideal" is that such advertising is not free; thus groups without sufficient funds may be denied this form of counter speech.[132] On the other hand, letter-writing campaigns by slavery reparation proponents to those newspapers that ran the advertisements represent a no-cost means of access to the marketplace to counter the Horowitz ad. The opinions pages could be turned into a robust forum for debate and dialogue on the issue.

When newspapers choose not to run speech because it may offend their readers, and when that speech is on an issue of political importance, the marketplace of ideas typically has been harmed. The case of David Horowitz, however, was not the norm. In fact, the decision of some editors not to publish the advertisement actually gave Horowitz the increased media coverage he desired. The story made many major national media outlets including *Newsweek*,[133] *U.S. News & World Report*,[134] *The Washington Post*,[135] and the *Los Angeles Times*.[136] This response, however, is not typical and should not be seen as a mitigation of the harms that self-censorship creates.

The David Horowitz advertisement was not the only newspaper publication that many found offensive and racist in 2001. The next section details another example of offensive speech in print.

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132. This reflects the problem of access to a marketplace of ideas that is dominated by those individuals and entities with economic resources. *See* Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1115 (2000) (observing that "[i]n the 'marketplace of ideas,' a monopoly may occur where a single individual (or firm) has control over the majority of avenues of communication," and noting the danger of "excessive 'access' prices created by the monopolistic structure of the market").

133. Alter, *supra* note 114, at 31.

134. Leo, *supra* note 21, at 14.

135. Powell, *supra* note 115, at C1.

136. Trounson, *supra* note 116, at B1.

2. Political Cartoons and the China Crisis

As mentioned in Part I, *Hustler Magazine, Inc. v. Falwell* is one of the most important case precedents supporting protection of offensive speech.[137] There, the Court likened the parody of Reverend Jerry Falwell to a distant cousin of a "political cartoon or caricature."[138] In the process, the Court extolled the importance of offensive political cartoons in the United States throughout history, lauding them because they "undoubtedly had an effect on the course and outcome of contemporaneous debate."[139] The Court observed that such cartoons often rely "on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject [portrayed]."[140]

It should be no surprise, then, that in April 2001, after a Chinese military plane clipped a United States spy plane over international waters, that offensive political cartoons came to the forefront of debate. In particular, Pulitzer Prize-winning political cartoonist Pat Oliphant drafted a cartoon that

> portrays a buck-toothed Chinese waiter delivering cat gizzard noodles to a customer who concedes he has been 'slowly used to doing business with China.' The waiter trips, dumping noodles on the head of the customer, who says the waiter must have been waiting for an apology. The waiter jumps up and down while saying, 'Apologize Lotten Amellican!' [sic] The customer, who gets up in a huff and leaves, is Uncle Sam.[141]

Not surprisingly, the work, with its physical and lingual jabs at the Chinese, offended many. In particular, the "1,700 member Asian American Journalists Association said Oliphant's work 'crossed the

137. *See supra* notes 37-45 and accompanying text.
138. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54 (1988).
139. *Id.* at 55.
140. *Id.* at 54.
141. Marsha Ginsberg, *Crisis Inflames Bias Against Asians*, S.F. CHRON., Apr. 14, 2001, at A1.

line from acerbic depiction to racial caricature.'"[142] The group demanded that the cartoonist stop using racial stereotypes.[143]

Since the First Amendment protects the cartoon, the issue revolved not around government censorship, but private journalistic censorship. Indeed, some newspapers exercised self-censorship—similar to the David Horowitz slavery reparations advertisement—and refused to run the Oliphant cartoon.[144]

The Asian American Journalists Association's remarks highlight the problem with restricting offensive cartoons.[145] In particular, where is the line between "acerbic depiction" and "racial caricature"? Indeed, the *Falwell* Court doubted whether it was possible to create a "principled standard" to make such a separation.[146]

To prohibit racial caricatures because they are offensive—even if that term could be precisely defined—would affect far more than the world of political cartoons. Among other things, it would impact comedy that challenges societal convention and practice. *Saturday Night Live* alumnus Chris Rock, one of the top comedians in the United States today, often invokes stereotypes and caricatures not only of Caucasians but also of African-Americans during his stand-up routines.[147] If we stop protecting cartoons like Oliphant's, the danger of creating a slippery slope of increasing censorship would not be far behind. Perhaps, contrary to the lyrics of R.E.M., comedian Lenny Bruce *would* be afraid were he alive today.[148]

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142. *Id.*

143. *Id.*

144. *Id.* (observing that the *San Francisco Chronicle* "declined to run" the cartoon).

145. *See supra* notes 141-143 and accompanying text.

146. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

147. Michael Blowen, *Rock Repays Old Debt with Barrel of Laughs*, BOSTON GLOBE, Feb. 12, 1999, at E6. "Rock artistically interweaves class, sexual, and racial stereotypes into a broad tapestry of contemporary life while keeping everyone in stitches." *Id.* One of Rock's more infamous routines addresses the differences between "black people" and "n----s," poking fun in what some would consider an offensive manner about racial issues. *See* Mark Oppenheimer, *The P.C. Police Are Getting Laughed Out of Town*, L.A. TIMES, Jan. 7, 2001, at E2 (referring to Rock's routine on this issue).

148. *See* R.E.M., *It's the End of the World As We Know It (and I Feel Fine)*, *on* DOCUMENT (I.R.S. Records 1987) (singing "Lenny Bruce is not afraid"); *see also* EDWARD DE GRAZIA, GIRLS LEAN BACK

Ultimately, speech that is racially offensive to some is not likely to disappear from the newspaper medium anytime soon. Both the Horowitz advertisement and the Oliphant cartoon targeted minorities within the United States' borders. Such offensive speech imposes a high "psychic tax" on minorities.[149] The cases suggest that the ongoing struggle to determine whether the imposition of such a psychic tax outweighs the benefits of freedom of speech and press is far from decided.

C. Broadcasting: From Offensive Talk Shows to Offensive Tunes

Since the United States Supreme Court issued its 1978 decision allowing the Federal Communications Commission to regulate speech that, although not obscene, is indecent,[150] radio and television broadcasters have been pushing the indecency envelope. So-called "shock jocks" like Howard Stern and Doug Tracht[151] readily come to mind when one thinks of broadcast personalities who are willing to test the boundaries of offensiveness and, in particular, indecency. On television, shows like Matt Stone and Trey Parker's animated *South Park* series challenge our extant community standards for offensiveness.[152] Moreover, language in general on television has grown increasingly coarse in recent years.[153]

EVERYWHERE 444-79 (1992) (providing backgound on Lenny Bruce and his legal battles stemming from his nightclub shows).

149. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 18 (writing that "[t]olerance of hate speech is not tolerance borne by the community at large. Rather it is a psychic tax imposed on those least able to pay.").

150. FCC v. Pacifica Found., 438 U.S. 726 (1978).

151. *See* Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, But the First Amendment Issues Don't*, 79 B.U. L. REV. 959, 966-71 (1999) (discussing Tracht's termination from WARW-FM in Washington, D.C., in early 1999 when, "[a]fter playing a . . . clip [from a song by African-American] hip-hop artist Lauryn Hill, [he] remarked, 'No wonder people drag them behind trucks'").

152. *See* Terry Morrow, *Blame Cartman*, PITTSBURGH POST-GAZETTE, June 23, 2000, at 52. *South Park* is a "lewd and lovable" show that is "one of Comedy Central's branding touchstones." T.L. Stanley, *'South Park's' Neighborhood Has Become Prime Real Estate*, L.A. TIMES, Apr. 4, 2001, at F10. The show features a cast of "foul-mouthed third-graders." Morrow, *supra* at 52.

153. *See* Dave Tianen, *The f Word*, MILWAUKEE J. SENTINEL, May 28, 2000, at 15E (observing "the lines that have historically defined acceptable speech on network television are being redrawn. The

Two forces—one a lengthy report by the FCC, the other an artist whose work already has run afoul of that same agency—fueled the 2001 debate over how to define indecency in the broadcast medium. Although indecency is legally defined as a subset of the more general concept of offensive speech that precisely focuses on sexual and excretory activities and organs,[154] the FCC's elastic interpretation of indecency affects the scope of offensive expression ventilated over the airwaves. The work of artist Eminem, in turn, is particularly provocative because, while music critics often laud it,[155] both women's organizations and gay and lesbian groups just as often criticize it for its offensive nature. Eminem, in brief, places himself firmly at the center of the debate between First Amendment artistic freedom and an as-yet-not-realized right to be free from offense.

1. The FCC's 2001 Policy Statement on Indecency

A writer for the *Los Angeles Times* made the following observation in April 2001—an observation that is obvious to anyone who has scanned the dial of morning radio shows these days:

> Across the nation, radio stations are locked in a fierce battle for listeners, and the weapon of choice is a steady barrage of jokes about body parts and bodily functions that sound more like a live feed from a high school boys' locker room than the central component of a widespread corporate strategy.

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changes are coming with surprising speed, for a variety of reasons, and may foreshadow a day not long in the future when there will be few barriers restricting the use of profanity on television.").

154. The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Action for Children's Television v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995) (en banc).

155. *See* Timothy Finn, *The Enigma of Eminem*, K.C. STAR, Feb. 20, 2001, at E1 (observing that "so many music critics and commentators are gushing over the artist and his material").

> The prevailing voice of morning radio is wicked, crude and unfiltered – and it has the blessing of radio's bosses.[156]

For instance, the FCC issued a Notice of Apparent Liability for Forfeiture in April 2001 against Chicago-based WKQX-FM in the amount of $14,000 for "willfully and repeatedly broadcasting indecent language" on the "Mancow Morning Madhouse."[157] The content at issue dealt in graphic detail with both "fisting" and oral sex.[158] According to the FCC, one "segment allegedly featured an interview with three women who discussed their sex lives generally, and oral sex in particular. One of the questions allegedly asked and answered was whether the women spit or swallowed their partner's sperm."[159] During the question-and-answer session, sounds of women moaning played in the background.[160]

Just a week earlier, the FCC had issued another Notice of Apparent Liability for Forfeiture, this time against the licensee of Fort Worth-based station KEGL-FM for $14,000, based upon several segments of a program called "Kramer and Twitch."[161] According to the FCC, one segment

> contains dialogue between the hosts and a teenage female caller, wherein, among other things, the hosts and the caller discuss bisexuality and masturbation, and the hosts attempt to have the caller masturbate during the course of the conversation. The tone of the conversation is pandering and titillating in that the hosts persistently inquire about the caller's frequency and methods of

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156. Phil Davis, *Radio: You Can Say That – And Worse*, L.A. TIMES, Apr. 8, 2001, at 5.

157. *See* Emmis FM License Corp. of Chi., File Nos. EB-00-IH-0401, FCC DA 01-870 (adopted Apr. 5, 2001) (Notice of Apparent Liability for Forfeiture), *available at* http://www.fcc.gov/eb/Orders/2001/da01870.html (last visited May 7, 2001).

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* Citicasters Co., File No. EB-00-IH-0261, FCC DA 01-812 (adopted Mar. 30, 2001) (Notice of Apparent Liability for Forfeiture), *available at* http://www.fcc.gov/eb/Orders/2001/da01812.html (last visited May 7, 2001).

masturbation, and they assert that the caller's father masturbates despite his apparent disapproval of her doing so.[162]

It is not surprising then, in light of these examples and the general trend toward more explicit radio content, that the FCC released an extensive Policy Statement in April 2001 designed to give broadcasters guidance on how the FCC interprets its indecency guidelines.[163] The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[164] It is important to note, for purposes of this discussion, the definitional link here between indecency and offensiveness, with the former being defined—at least in part—in terms of the latter.

The Policy Statement initially articulates some basics about the FCC's regulatory power: (1) that the Supreme Court has upheld the FCC's power to regulate broadcast indecency;[165] (2) that indecent broadcast speech is exempted from regulation during the so-called safe-harbor time period from 10:00 P.M. through 6:00 A.M.;[166] and (3) that the compelling government interests underlying the regulation of indecent broadcast speech outside of that safe-harbor zone are a concern for children's well being and a desire to enhance parental supervision of children.[167]

The Policy Statement then identified a two-part analytical approach for determining whether any particular broadcast fits within the

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162. *Id.*

163. *See* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, File No. EB-00-IH-0089, FCC 01-90, Policy Statement (adopted Mar. 14, 2001), *available at* http://www.fcc.gov/Bureaus/Enforcement/News_Releases/2001/nren0109.html (last visited May 7, 2001) [hereinafter Policy Statement].

164. Action for Children's Television v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995).

165. Policy Statement, *supra* note 163, at 2 (citing the Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

166. *Id.* at 3, § II.5.

167. *Id.* at 3, § II.6.

definition of indecent broadcasting content.[168] First, the material in question must relate to sexual or excretory organs or activities.[169] If it does, then one turns to the second question tied directly to the concept of offensive expression: Is the material patently offensive as measured by contemporary community standards for the broadcast medium?[170]

To answer this second question, the FCC's Policy Statement provides that the full context in which the speech took place "is critically important."[171] Within this full context, the FCC identified three important variables to consider:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value.*[172]

What is striking about this three-factor test is it creates the illusion of objectivity in attempting to define an inherently subjective and malleable term, namely patent offensiveness. Parsed differently, the FCC is attempting to make a subjective concept by striving to eliminate the "one man's vulgarity is another's lyric"[173] dilemma plagueing efforts to separate offensive from non-offensive speech.

The Policy Statement provides examples of FCC decisions to illustrate the application of each of these three factors. A review of the examples reinforces the point made at the beginning of this Part, which is that *depending at least on how one defines the term,* offensiveness is rampant on the airwaves. This is not to say, however,

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168. *Id.* at 4, § III.A.7-8.
169. *Id.* at 4, § III.A.7.
170. *Id.* at 4, § II.A.8.
171. *Id.*
172. *Id.* at 5, § III.B.10.
173. Cohen v. California, 403 U.S. 15, 25 (1971).

that punishment of offensive speech is justified. In other words, just because the FCC rules that something is indecent does not mean that its decision is correct or should control societal conventions of language and taste. Even with the application of the three factors, there is still much that is subjective about the meaning of patent offensiveness in the FCC's definition of indecency. It is this type of subjectivity that lends itself to unfair enforcement of government powers.

The FCC's analytical framework for indecency set forth in 2001 may result in a new wave of self-censorship. Broadcasters may use the framework to estimate whether their own material would be indecent prior to airing it. In the process, some broadcasters may err on the side of caution and refrain from airing material they consider potentially indecent because they are unclear as to how the FCC would categorize it. In sum, government rules comprised of vague terms like "indecency" that, in turn, are defined by vague concepts like "offensive," chill free expression.

2. Eminem Calls the Tune

In January 2001, the FCC fined Madison, Wisconsin-based radio station WZEE-FM $7000 for airing approximately half of the unedited version of Eminem's hit song, *The Real Slim Shady*.[174] The FCC's ruling criticized Eminem's lyrics as appearing to be "designed to pander and shock."[175] The complete lyrics to the uncensored version of the song—replete with the words ass, hump, clitoris, fuck, shit, damn, and bitch, as well as phrases like "gave head" and "jackin' off an' jerkin'"—are appended to the FCC Enforcement Bureau's Notice of Apparent Liability for Forfeiture.[176]

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174. Tom Alesia, *Eminem Cut Draws FCC Ire*, WIS. ST. J., Jan. 26, 2001, at B1. The station claimed the airing was accidental. *Id.*

175. *See* Capstar TX Ltd. P'ship, File No. EB-00-IH-0293, FCC DA 01-111 (adopted Jan. 16, 2001), *available at* http://www.fcc.gov/eb/Orders/2001/da01111.html (last visited May 7, 2001).

176. *Id.*

Eminem's music has drawn the ire of more than just the FCC. When he received several Grammy award nominations in 2001, the National Organization for Women and the Gay & Lesbian Alliance Against Defamation decried the nominations.[177] These groups view his lyrics as misogynistic and homophobic—in other words, speech that smacks of offensiveness.

All of this offensiveness, however, proves extremely popular today. *The Marshall Mathers LP* has sold over eight million copies.[178] Eminem received four Grammy nominations in 2001 and won three, including best rap album, best solo rap performance, and best rap performance for a duo or group (with Dr. Dre).[179] The only Grammy he was nominated for and did not receive was for album of the year, which went to Steely Dan.[180] Eminem is "the first white artist in the history of the music to be widely played on rap radio stations in black urban areas."[181]

Offensively successful, Eminem challenges our culture both in terms of language and in terms of how much First Amendment protection we are willing to afford artists whose work, arguably, hurts others. More importantly, the response to his lyrics reveals a problem that threatens to derail any effort to regulate offensive speech: the subjectivity, and more specifically, the cultural battle over meaning.

Eminem's song *Stan*, which he sang as a duet with Elton John at the 2001 Grammy Awards and for which gay rights groups criticized John, describes a fan named Stan who ties his pregnant girlfriend up with rope, stuffs her in the trunk of his car, and then drives it over a bridge.[182] While some argue the song glorifies violence, others view

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177. Varga, *supra* note 11, at F1.

178. Chonin, *supra* note 10, at A1.

179. Steve Morse, *Grammys Go With Voice of Experience in Steely Dan*, BOSTON GLOBE, Feb. 22, 2001, at D1.

180. *Id.*

181. Ralph Frammolino & Geoff Boucher, *Rap Was Eminem's Roots and Road Out of Poverty*, L.A. TIMES, Feb. 21, 2001, at A1.

182. *The Lyrics to Eminem's 'Stan': How Will They Be Sung on TV?*, L.A. TIMES, Feb. 21, 2001, at F4 (setting forth the complete lyrics to *Stan*).

it as Eminem's warning that people should not take what he sings about seriously or literally.[183] Yet given the media-blame game climate today, one can easily envision a victim filing a suit against Eminem should someone who listens to the artist commit an act of violence against gays and women.[184] Eminem, however, has said that his young audience members "are taking my music for what it's worth, you know what I mean? They're taking it with a . . . grain of salt."[185]

The definition of "meaning," like the concept of offensiveness, can never be absolutely fixed.[186] People of different experiences, different ages and different educational backgrounds may interpret or decode the same musical message in very different ways. Indeed, "meaning is at least as much in the culture as in the message."[187] Culture itself can be defined as "the site where meaning is generated and experienced."[188] The subjectivity of meaning that Eminem's lyrics expose, as well as the diametrically opposed responses to his music, are indicative of the challenges inherent in regulating "offensive" speech.

D. Photographs: Images of Death

Images of death both fascinate and offend. In 1928, the *Daily News* ran a photograph of Ruth Snyder, strapped to an electric chair, under the screaming headline, "DEAD!"[189] Captured at the moment of

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183. The song can be interpreted as "a tale about an obsessed fan that also serves as a response to [Eminem's] critics (the moral is, don't practice what Eminem preaches)." Neil Strauss, *Eminem Grabs Spotlight, but Steely Dan Wins Best Album*, N.Y. TIMES, Feb. 22, 2001, at A22.

184. *See generally* Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones*, 2000 L. REV. MICH. ST. U. DETROIT C.L. 151 (2000) (analyzing the current public climate hostile to the media).

185. Michael D. Clark, *Eminem Steals Show's Spotlight with Controversy*, HOUSTON CHRON., Feb. 21, 2001, at 1 (alterations in original).

186. REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 270 (Stuart Hall ed. 1997).

187. JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 7 (2d ed. 1990).

188. GRAEME TURNER, BRITISH CULTURAL STUDIES: AN INTRODUCTION 15 (1990).

189. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 38-40 (2000).

death by a witness wearing a tiny hidden camera, the photograph helped the newspaper sell one million extra copies on the day it ran.[190] Fastforward nearly seventy years to 1997 where photographs of the JonBenet Ramsey murder scene, published in the tabloid *Globe*, captured national attention.[191] The *Globe* also published stolen autopsy photos of the child, which deeply offended the sensibilities of her parents, John and Patsy Ramsey.[192]

In 2001, more photographs of death caught the public's attention, raising questions about offensiveness and access to information, while exposing the tension between the right to privacy and the dissemination of newsworthy information. In this case, the photographs were not of a child beauty queen or an electrocuted woman, but of the late NASCAR driver, Dale Earnhardt.[193] Earnhardt died in a crash at the end of a race in Daytona, Florida, sparking a heated debate over whether head-and-neck safety protection devices could have saved his life.[194]

The Earnhardt saga illustrates an offensive speech issue not yet here discussed. That issue has nothing to do with sexist, racist or homophobic vitriol or rhetoric. Likewise, it has no relation to hot-button topics like abortion rights or slavery reparations. Instead, what is offensive is simply the potential for the widespread publication of truthful, accurate images.

In particular, the public may find disclosure of photographs of death offensive because a horrific death could become a public voyeuristic spectacle. Publicly released photographs of the decedent

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190. *Id.* at 39.

191. *See* Kevin McCullen, *2 Arrested in Crime Photo Leak*, ROCKY MOUNTAIN NEWS (Denver), Jan. 16, 1997, at 5A.

192. *See* JOHN RAMSEY & PATSY RAMSEY, THE DEATH OF INNOCENCE 218-22 (2000) (reflecting John and Patsy Ramsey's reaction to the *Globe*'s publication of the autopsy photographs).

193. Al Levine, *NASCAR Notebook: Earnhardt's Widow Pleads Case*, ATLANTA J. CONST., Apr. 9, 2001, at F2.

194. *Expert Says Earnhardt Died When Head Whipped Forward*, ST. LOUIS POST-DISPATCH, Apr. 11, 2001, at B2.

could easily find their way onto the Web,[195] radically converting the traditional private funeral home viewing for loved ones of the deceased into a gawking public spectacle. As widow Teresa Earnhardt put it, public release of the photographs "will only violate the privacy of our family. What is happening to us is wrong, and we don't want any other family in America to go through what we're going through."[196] Her view eventually prevailed in Florida, where Governor Jeb Bush signed the *Earnhardt Family Protection Act* into law, allowing only judicially ordered autopsy photo release.[197] Other states are now considering similar measures to restrict access to autopsy photographs.[198]

The Earnhardt issue involved balancing the public interest in learning newsworthy information about what killed the racecar legend with the offensiveness the public dissemination of the photographs might cause. The *Orlando Sentinel* wanted to view the photographs not, so it claimed, to publish them, but rather to use them as part of an independent investigation performed to determine the cause of death. In brief, the newspaper assumed the role of an independent watchdog[199] to assure that the medical examiner, a government official, was not covering up the real cause of death in order to

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195. In May 2001, a Florida appellate court denied Michael Uribe, who previously posted autopsy photographs of other deceased NASCAR drivers on his Web site, access to the Earnhardt autopsy photographs. *Web Site Owner Denied Earnhardt Autopsy Photos*, DAYTON DAILY NEWS, May 9, 2001, at D6.

196. Blount, *supra* note 12, at 11.

197. *See* Thomas B. Pfankuch, *Earnhardt Autopsy Bill Moves Along*, FLA. TIMES-UNION (Jacksonville), Mar. 14, 2001, at A1 (describing the bill); *Governor Signs Law Limiting Access to Autopsy Photos*, Student Press Law Center Web Site, *at* http://www.rcfp.org/news/2001/0402hb1083.html (last visited Apr. 22, 2001).

198. *See Capitol Insider: Bill Restricting Access to Autopsy Photos OK'd*, ATLANTA J. CONST., Mar. 21, 2001, at 4B (describing a bill in the Georgia House that bars the release of autopsy photographs unless the family of the deceased gives its permission); Carl Redman, *House Panel Targets Public Records*, BATON ROUGE ADV., May 3, 2001, at 8A (describing the efforts in Louisiana to limit the public use of autopsy photos).

199. It is sometimes asserted, "the press has special institutional responsibility as a watchdog of government." SULLIVAN & GUNTHER, *supra* note 27, at 419. *See generally* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 260-87 (1991) (describing the "Fourth Estate" model of press freedom in which journalists must receive First Amendment protection in order to serve as a check on transgressions of the three branches of government in the fulfillment of their duties).

protect the image of NASCAR, stock-car racing's sanctioning organization.

The Earnhardt case suggests that when the press, attempting to perform its job of reporting newsworthy information, offends community sensibilities, legislatures are quick to step in to protect the community at the risk of sacrificing First Amendment interests. One recalls the efforts to regulate photojournalists in the United States after the public initially blamed the paparazzi for the death of Princess Diana of Wales.[200] The allegedly offensive conduct of hounding celebrities—hounding them to death, so it was thought in Diana's case—justified in many people's minds attempts to reign in a free press.

Although the Earnhardt situation has not yet spawned a civil lawsuit by Teresa Earnhardt against the news media (in part, probably, because the *Orlando Sentinel* agreed not to publish the photographs), the controversy potentially implicates the privacy tort known as public disclosure of private facts.[201] To succeed under this cause of action, the plaintiff must prove not only that publicity given to a private fact is highly offensive, but also that the fact disclosed is not newsworthy.[202] Newsworthiness is a defense that immunizes journalists who publicize private and embarrassing facts about individuals from liability.[203] Parsed differently, newsworthiness

200. *See* CALVERT, *supra* note 189, at 191-98 (describing the rush to create so-called anti-paparazzi legislation after Diana's death).

201. "The claim that a publication has given unwanted publicity to allegedly private aspects of a person's life is one of the more commonly litigated and well-defined areas of privacy law." Shulman v. Group W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998). This tort "restricts public disclosure of embarrassing personal facts." PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 124 (1997); *see* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining the tort of public disclosure of private facts and providing that a person "who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate [public concern]").

202. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

203. "A media defendant is constitutionally permitted to publicize [private] facts about an individual's private life when those facts are newsworthy." Green v. Chi. Trib. Co., 675 N.E.2d 249, 261 (Ill. App. Ct. 1996).

trumps speech that is otherwise offensive, at least for the public disclosure of private facts tort.

Like it or not, autopsy images of a public figure like Dale Earnhardt are newsworthy. They might illustrate the need for improved safety devices in the cars driven by NASCAR racers. They might, in other words, help save lives. They also might reveal the sheer danger of the sport. They might, in turn, affect the lives of others considering entering the profession, either deterring them from or luring them to a fast life on the racetrack.

Just as the political value of David Horowitz's slavery reparations advertisement stands in equipoise to the offensiveness of his position, the newsworthiness defense for the disclosure of images of death stands counterpoised to the offensiveness that might result from their publication.[204] In all the cases and controversies previously mentioned in this Article, reasonable arguments exist to rebut the censorship (and self-censorship) of offensive speech. But in the case of the Dale Earnhardt photographs, the Florida legislature has moved with lightning speed to stymie those points. Limiting access to newsworthy autopsy photographs, despite their potential to offend, was a troubling development in 2001.

E. Face-to-Face Offensiveness: From the Schoolhouse to the Public Streets

Up to this point, this Article has analyzed issues of offensive speech in the media, ranging from material posted on the Web to that printed in newspaper advertisements. Offensive speech, of course, also exists in non-mediated day-to-day interactions between individuals. This section analyzes two aspects of non-mediated offensive speech: 1) speech in school settings that might offend students, and 2) speech on public streets and sidewalks that might offend passersby.

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204. *See supra* Part II.B.1 (discussing the political value of Horowitz's advertisement in that it triggered discussion of an important and contested issue affecting the allocation of taxpayer dollars).

1. Saxe v. State College Area School District[205]

Bullies have long utilized schoolyards, locker rooms, and out-of-the-way corridors as venues to taunt students who appear weaker, smarter or different. While some may view childhood cruelty as a harmless growing pain,[206] psychological experts moved by the recent surge in school violence warn of the latent effects of prolonged ridicule.[207] Such warnings have prompted school officials to find ways—typically through hastily developed policies—to curb the physical and verbal abuse.[208]

Although school officials may craft such regulations with the laudable intent of creating and maintaining a safe educational environment, they are often replete with amorphous definitions and vague proscriptions that span over protected categories of speech and thus provoke a constitutional showdown. At the core, they promise to punish those who engage in *offensive* expression, which occurred with an anti-harassment policy passed unanimously by school officials in the Central Pennsylvania town of State College.[209]

In August 1999, the State College Area School District approved a policy designed to keep students from harassing each other on the basis of "one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal

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205. 240 F.3d 200 (3d Cir. 2001).

206. *See* Erica Goode, *School Bullying is Common, Mostly by Boys, Study Finds*, N.Y. TIMES, Apr. 25, 2001, at A17 (suggesting that "in the past, bullying has simply been dismissed as kids will be kids").

207. *See id.* (observing the link between harassment and incidents of school violence and that both the bullies and the bullied "may represent an especially high-risk group").

208. At least five states—California, Colorado, Georgia, New Jersey, and Washington—currently have pending legislation that would outlaw bullying. *See Bullying Fright Club*, NEWSWEEK, May 7, 2001, at 8; *see also* Tan Vinh, *Anti-Bully Bill Announced; Legislation Aims to Curb School Violence*, SEATTLE TIMES, Jan. 26, 2001, at B2. School officials in other states are exploring the problem through various programs. *See, e.g.*, Linda M. Billingsly, *Students Unite to Discuss Bullies and Outcasts in High School*, ST. LOUIS POST-DISPATCH, Oct. 18, 1999, at 5 (describing a seminar for St. Louis area high schools called "Breaking the Silence About Violence"); Kristen Bradley, *New School Program Aims to Nip Bullying in the Bud*, BOSTON HERALD, Feb. 3, 2001, at 8 (discussing the Roxbury, Massachusetts "Bully Prevention Program").

209. *See* Erin R. Wengerd, *SCASD Approves Policy*, CENTRE DAILY TIMES (State College, Pa.), Aug. 10, 1999, at A1 (describing the year-long process of crafting the policy's language).

characteristics. . . ."[210] To further describe the type of conduct prohibited under the policy, the district enumerated specific examples:

> Harassment can include any unwelcome verbal, written or physical conduct which *offends*, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.[211]

Two months after the policy's passage, State College resident David Warren Saxe sued the district on behalf of his two children, challenging the policy on First Amendment grounds.[212] Saxe alleged that he and his children are Christians who believe that "homosexuality is a sin."[213] As such, the plaintiffs further indicated "they feel compelled by their religion to 'speak out' about the sinful nature and harmful effects of homosexuality and other topics, especially moral issues."[214] Saxe later told a newspaper reporter that he and his children felt a duty to share these beliefs with gay people.[215]

Saxe, a member of the Pennsylvania Board of Education and a perennial thorn in the side to the directors of the State College Area School District,[216] filed the federal lawsuit with the help of the

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210. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202 (3d Cir. 2001).

211. *Id.* at 202-03 (emphasis added).

212. Saxe v. State Coll. Area Sch. Dist., 77 F. Supp. 2d 621 (M.D. Pa. 1999), *rev'd*, 240 F.3d 200 (3d Cir. 2001).

213. *Id.* at 622.

214. *Id.* at 622-23.

215. Matt Seigel, *SCASD Ruling Could Resonate: Court Decision on School's Anti-Harassment Policy May Have Far-Reaching Impact*, CENTRE DAILY TIMES (State College, Pa.), Feb. 16, 2001, at 1.

216. *Id.* (referring to Saxe as a "frequent critic" of the school district who has run unsuccessfully for a seat on the district's board of directors).

conservative American Family Association Center for Law and Policy.[217]

The district court refused to view the school district's policy as a speech code as the plaintiffs had hoped.[218] Instead, it focused on a directive in the policy requiring a school employee to "take action when the harassment may be *unlawful*."[219] That mandate convinced the court the school district was "not prohibiting anything that [was] not already prohibited by law."[220] In the district court's view, the school district simply incorporated and drew upon other harassment statutes that already "withstood constitutional challenge."[221] In short, the policy was valid because it was "subject to a limiting construction."[222]

On appeal, the Third Circuit Court of Appeals rejected the district court's reasoning, stating: "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[223] The appellate court further recognized that the school district's policy swept into its proscription "a substantial amount of speech that would not constitute actionable harassment under either federal or state law."[224]

The school district's policy attempted to take advantage of the blanket of existing law by prohibiting behavior that created "an intimidating, hostile or offensive environment."[225] The district court

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217. This Tupelo, Mississippi-based organization is part of the Christian American Family Association and provides legal services to conservative causes on its behalf. *See* Gretchen Schuldt, *State Sued After Child Questioned at School*, MILWAUKEE J. SENTINEL, Aug. 13, 1999, at 1.The organization recently sued a Minnesota school district after a high school principal banned a student's "Straight Pride" sweatshirt. *See Order, Not Pride, Is the Issue*, OMAHA WORLD-HERALD, Apr. 13, 2001, at 12.

218. While the court recognized that speech codes "[had] been the subject of considerable discussion and debate in recent years due to their plainly overreaching effects," the court distinguished between policies prohibiting hate speech and those prohibiting harassment, writing: "Harassment has never been considered to be protected activity under the First Amendment." *Saxe*, 77 F. Supp. 2d at 626-27.

219. *Id.* at 626.

220. *Id.*

221. *Id.* at 626 n.7 (emphasis omitted).

222. *Id.* (citations omitted).

223. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

224. *Id.*

225. 77 F. Supp. 2d at 623.

lumped the proscribed activity loosely under the definition of harassment, but the Third Circuit found that such a "categorical pronouncement exaggerates the current state of the caselaw in this area."[226]

The appellate court observed:

> There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.[227]

In recognizing the policy as unconstitutionally broad, the court of appeals pointed out the irony of attempting to shut out negative speech about someone's values. It suggested that "[b]y prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment."[228]

While the Third Circuit ruled against the school district in *Saxe*, this ruling is not an indication that *all* speech that might offend is protected in public school settings. For instance, in July 2000, the Sixth Circuit Court of Appeals upheld an Ohio high school's ability to prohibit students from wearing Marilyn Manson T-shirts to school.[229] The school's dress policy prohibited students from wearing "clothing with offensive illustrations."[230] The Manson T-shirt in question, worn by student Nicholas J. Boroff, had a three-faced Jesus on the front with the words "See No Truth. Hear No Truth. Speak No

226. 240 F. 3d at 206.
227. *Id.*
228. *Id.* at 210.
229. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 460 (6th Cir. 2000).
230. *Id.* at 467.

Truth." while the backside featured the word "BELIEVE" with the letters "LIE" highlighted.[231] The Sixth Circuit concluded, "where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts."[232]

This decision is in line with other court precedents protecting the ability of schools to regulate offensive clothing without infringing on students' First Amendment rights.[233] Courts have reached these decisions premised on the United States Supreme Court's 1986 decision in *Bethel School District No. 403 v. Fraser*,[234] which upheld the public school's ability to punish a student for making a sexual double-entendre-laden speech to a captive audience of minors during a school-sponsored assembly.[235]

Even colleges may restrict offensive speech in captive-audience classroom situations if it is not germane to the subject matter.[236] In March 2001, the Sixth Circuit Court of Appeals held that a college's ability to maintain an educational atmosphere that was not hostile to women trumped a professor's First Amendment and academic freedom rights to use words like "pussy" and "cunt" in a college classroom.[237] In brief, there are interests that may outweigh the right to be offensive in educational settings despite the holding in *Saxe*.

2. Taking it to the Streets: Begging and Offensive Speech

Offensive speech need not always come in the form of racist, sexist, or homophobic language. Instead, it may simply be unpleasant,

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231. *Id.*

232. *Id.* at 470.

233. *See, e.g.*, Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1537 (E.D. Va. 1992) (holding that the one-day suspension of a female student for wearing a shirt printed with the words "Drugs Suck!" did not violate the student's constitutional rights).

234. 478 U.S. 675 (1986).

235. *Id.* at 685.

236. Bonnell v. Lorenzo, 241 F.3d 800, 803 (6th Cir. 2001).

237. *Id.*

inconvenient, and annoying brushes with speech that does little more than ask for a handout of some spare change. Likewise, one may take offense at a request for change simply because the activity itself seems to contradict societal norms that value hard work and effort.

In August 2000, the Seventh Circuit Court of Appeals rejected a First Amendment challenge to what it considered a content-neutral ordinance regulating panhandling.[238] Although the appellate court assumed for purposes of appeal that "some panhandler speech would be protected by the First Amendment,"[239] it recognized, as important and significant, Indianapolis' interest in both the safety of its citizens, and in protecting residents from "unwanted or bothersome"[240] speech when they "might wish especially to be left alone."[241] Conversely, in September 2000, the Ninth Circuit Court of Appeals affirmed the issuance of a preliminary injunction preventing Los Angeles from enforcing an anti-solicitation ordinance.[242]

The panhandling issue raises an important point about offensive speech—we must tolerate more speech with which we disagree or find offensive if it occurs in a public place without any captive audience. As the U.S. Supreme Court wrote in protecting the right of Paul Robert Cohen to wear the words "Fuck the Draft" on his jacket inside a public courthouse:

> Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest . . . than, for example, strolling through Central Park, surely it is nothing like the

238. Gresham v. Peterson, 225 F.3d 899, 901 (7th Cir. 2000).
239. *Id.* at 904.
240. *Id.* at 906.
241. *Id.*
242. Los Angeles Alliance for Survival v. City of Los Angeles, 224 F.3d 1076, 1076 (9th Cir. 2000).

> interest in being free from unwanted expression in the confines of one's own home.[243]

To put it another way, there is a major difference between tolerating offensive speech in a public school setting as in *Saxe* and tolerating it in a true public forum like a street, sidewalk, or park. Thus, to regulate public panhandling because the behavior is bothersome or unwanted or because we want to be left alone is problematic. When we are in public places, we have reduced and diminished expectations of privacy.[244] We can simply ignore or walk away from panhandlers; to paraphrase the Court in *Cohen*, we can avert our ears and our attention by moving on.[245]

CONCLUSION

The foregoing survey of recent offensive speech cases and controversies, although not encyclopedic or all encompassing in scope, does raise some important issues affecting freedom of expression at the dawn of the twenty-first century. Those issues are discussed here.

First, a review of the disputes suggests that free speech advocates may be just as concerned about *self-censorship* of offensive expression as they are about *government censorship*. For instance, the two 2001 federal appellate court decisions involving offensive expression—*Planned Parenthood*[246] and *Saxe*[247]—both came down squarely on the side of protecting offensive speech.[248] In *Planned Parenthood*, the Ninth Circuit protected a Web page that was, undoubtedly, profoundly offensive to many pro-choice abortion

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243. Cohen v. California, 403 U.S. 15, 21-22 (1971).
244. *Id.*
245. *Id.* at 21.
246. *See supra* notes 60-89, 193-216 and accompanying text.
247. *See supra* notes 205-28 and accompanying text.
248. *See supra* Parts II.A.1, II.E.1.

advocates.[249] In *Saxe*, the Third Circuit safeguarded the ability of students in public schools to engage in discourse about religious and moral values that other students might find offensive.[250] The self-censorship of offensive speech that occurred both when student newspaper editors refused to publish the David Horowitz-sponsored slavery reparations advertisement and when mainstream newspaper editors refused to publish Pat Oliphant's cartoon on the China crisis stands in stark contrast to the federal judicial system's protection of such speech.[251]

It may be that a climate of so-called political correctness makes private individuals and entities more willing to silence speech they find offensive than the First Amendment otherwise would protect. Parsed differently, public opinion about what speech should be protected may not match judicial opinion. However, First Amendment advocates should not be surprised by this possible disconnect between public and judicial sentiment when it comes to offensive expression. Why? In part because it is the purpose of the First Amendment to protect outside-the-mainstream viewpoints against the weighty crush of popular public opinion demanding those viewpoints be quashed.

A second, related issue raised is the time-consuming and high-cost nature of defending freedom of expression. Although the appellate courts eventually ruled in favor of offensive speech in the *Planned Parenthood* and *Saxe* cases, in each instance, the trial court initially squelched the speech in question.[252] In *Planned Parenthood*, a jury found the anti-abortionists liable for more than $100 million based on their speech activities.[253] Likewise, the district court in *Saxe* held the State College Area School District's anti-harassment policy

249. *See supra* Part II.A.1.
250. *See supra* Part II.E.1.
251. *See supra* Part II.B.1-2.
252. *See supra* Parts II.A.1, II.E.1.
253. *See supra* Part II.A.1.

constitutional.[254] It was only after the time and expense of the federal appellate process that the free speech interests in each case were vindicated.[255] There is a danger, of course, that not all parties who engage in expression deemed offensive by popular public opinion will have the financial resources to fight the onerous judicial battles to the finish.

A third issue raised in this Article, and illustrated by public response to Eminem's lyrics, is the notion that disputes over offensive expression reflect both generational and cultural fault lines in the United States. While the rapper's music is offensive to some segments of society, it is enjoyable to others. Younger audiences accept it and gobble up CDs, while older audiences detest it. Further, while some take music humorously and not at face value, others swallow it sans irony. To the extent that Eminem's music receives airplay on urban stations with large black audiences,[256] it shows that offensive speech may appeal across racial lines yet divide people along lines of gender and sexual preference.[257] The fractures are multiple, and the FCC is left to step in to act on behalf of the contested concept of the "public interest"[258] in order to sort out the mess when the music is played on the public airwaves.[259]

A fourth point to be taken from this Article is the idea that *context is key*. In particular, whether offensive expression deserves First Amendment protection is a highly contextual issue, with the factual circumstances of each controversy providing important variables for courts to consider in rendering decisions. For instance, Judge Kozinski and the Ninth Circuit in *Planned Parenthood* admonished

254. *See supra* Part II.E.1.

255. *See supra* Parts II.A.1, II.E.1.

256. *See supra* note 191 and accompanying text.

257. *See supra* Part II.C.2.

258. In granting licenses to broadcasters, the FCC is mandated to consider "whether the public interest, convenience, and necessity will be served by the granting of such application." 47 U.S.C. § 309(a) (2001).

259. *See supra* Part II.C.2.

that "the public nature of the speech"[260] affects whether courts will view it as either an unprotected threat of violence or as a protected instance of offensive speech.[261] Judge Kozinski noted an important distinction between statements made in the context of public discourse and those made in direct, personal communications, such as face-to-face and telephonic messages.[262]

It makes sense that we should tolerate more speech that may be offensive if it is made in the context of public discourse for debate rather than in a one-to-one setting for a fight. Thus, in *Cohen v. California*, the message "Fuck the Draft" not only dealt with an issue of public importance, but was conveyed in a public place and directed generally at all passersby rather than specifically at an individual.[263] Offensive speech is more likely to move from the protected realm of annoying and offensive to constituting a true threat or fighting words when it occurs in the context of a personal, face-to-face communication.

For instance, the advertisement David Horowitz submitted in 2001 to college and university newspapers dealt with the public issue of slavery reparations, and he directed it generally at the college newspaper-reading audience.[264] It was not a personal attack directed at any individual. These contextual factors militate against the self-censorship exercised by those newspaper editors who chose not to publish the ad.

Other contextual factors that may make a difference in determining whether offensive speech merits constitutional protection include both the setting in which the speech takes place and the medium through which that speech is conveyed. While the First Amendment rights of public school students in pedagogical settings are not co-

260. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1018 (9th Cir. 2001).

261. *Id.*

262. *Id.* at 1019.

263. *See supra* note 32 and accompanying text.

264. *See supra* notes 114-17 and accompanying text.

extensive with those of adults in non-school settings, the *Saxe* case proves that even schoolhouse settings are *not* special safe-havens free from offensive expression.[265] Regarding medium, although at least one federal appellate court substantially protects offensive speech posted on a Web site when the speech does not rise to the level of a true threat of violence, the FCC, struggling to provide objective criteria for measuring and evaluating subjective content, continues to strictly regulate offensive speech conveyed in the broadcast medium.[266] In short, the medium makes a difference.

The controversies outlined here also illustrate the myriad ways in which the public may consider speech offensive. It may be words that offend, as in the David Warren Saxe[267] and Eminem[268] controversies, or it may be printed drawings, as in the Pat Oliphant cartoon saga.[269] Alternatively, it may be the public dissemination of graphic images that offends, despite the fact that those images are accurate and unaltered, as evidenced by the dispute surrounding the potential release of the Dale Earnhardt autopsy photographs.[270]

Ultimately, the controversies surrounding the restriction of offensive speech, be it by government entities like the FCC and public school districts or by private entities like newspaper editors, are not likely to disappear. While the Third and Ninth Circuit Courts of Appeals provided victories in *Saxe* and *Planned Parenthood* for what many would consider offensive speech from the conservative-right side of the political spectrum, it could just as easily be alleged offensive speech from the liberal-left provoking outcries from the conservative right. Indeed, at the authors' home institution, The Pennsylvania State University, two left-leaning events in 2001 involving offensive speech—one provocatively called the "Cuntfest"

265. *See supra* Part II.E.1.
266. *See supra* Parts II.A.1, II.C.1.
267. *See supra* Part II.E.1.
268. *See supra* Part II.C.2.
269. *See supra* Part II.B.2.
270. *See supra* Part II.D.

and the other titled the "Sex Faire"—drew the wrath of some Republicans in the Pennsylvania legislature who threatened to cut off all state funding to the institution.[271] Thus, it must not be the offensive speech's political slant. Viewpoint neutrality is essential when it comes to protecting offensive speech.

The bottom line is that we, as a society and a legal system, probably have not come much closer to an understanding of offensive expression than we were back in 1971 when the Supreme Court articulated the opening line of this Article; "one man's vulgarity is another's lyric."[272] The statement's focus on the subjectivity of meaning underscores the point that individuals themselves, rather than government as proxy for those individuals should regulate offensive expression. Private individuals today—newspaper editors, for instance—seem more than willing to play the role of arbiter of good taste. While this result crimps the marketplace of ideas, it is surely a better result than allowing the government and judiciary to quash offensive expression with the force of law.

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271. *See generally* John M. R. Bull, *Penn State Campus Event is Protected Speech, Lawmaker Told*, PITTSBURGH POST-GAZETTE, Feb. 27, 2001, at C4 (describing the controversy over the Sex Faire).

272. Cohen v. California, 403 U.S. 15, 25 (1971).